



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 26

APPLICANT **M Ltd**
ON CLAIM AND
RESPONDENT
ON COUNTER-
CLAIM

RESPONDENT **KC**
ON CLAIM AND
APPLICANT ON
COUNTER-
CLAIM

The Tribunal orders:

1. KC is to pay the sum of \$1,638.00 to M Ltd on or before Monday, 20 February 2023. By that date, KC is also to pay to M Ltd the delivery costs payable under M Ltd's terms and conditions regarding the items KC purchased from M Ltd at auction on 21 August 2022 ("the Items").
2. Within ten working days of order 1 being complied with by KC, M Ltd will deliver the Items to KC.
3. If KC fails to comply with order 1 by the date set out in the order, the Items will become the property of M Ltd and it may dispose of them as it sees fit.
4. KC's counterclaim against M Ltd is dismissed.

REASONS

1. The Applicant, M Ltd, operates an auction business in [City 1] which is run by M Ltd's auctioneer, XT. The Respondent, KC, lives in [City 2] and collects silver bullion and coins as an investment in precious metals and not for resale in trade.
2. Between 17 April 2022 and 14 August 2022, KC participated in six M Ltd online auctions and was the highest bidder in relation to various coins and ingots ("the Auction 1 to 6 Items"). KC paid a total of \$6,093.60 to M Ltd for the Auction 1 to 6 Items, including the buyer's premiums and courier costs totalling \$135.60. On 21 August 2022, KC participated for a seventh time in a M Ltd online auction and was the highest bidder in relation to various items totalling \$1,365.00 plus a buyer's premium of \$273.00, with a total amount to be paid of \$1,638.00. The items consisted of 17 lots comprising various coins and an antique cameo brooch ("the Auction 7 Items").
3. After KC won the Auction 7 Items, he was told by a friend that the Auction 1 to 6 Items may be forgeries because some of them were quite rare examples. KC had all the Auction 1 to 6 Items tested for silver content and the tests showed that the items were fake and did not contain silver. KC then decided that he did not wish to complete the purchase of the Auction 7 Items because many of those items are coins that are very similar to the Auction 1 to 6 Items and are therefore also likely to be fake and worthless.

4. M Ltd brings a claim against KC in the Tribunal seeking damages of \$1,638.00, being the amount required to complete the purchase of the Auction 7 Items. M Ltd is ready to deliver the Auction 7 Items to KC (at his cost). The Auction 7 Items are held in M Ltd's safe. KC defends M Ltd's claim and brings a counterclaim against M Ltd seeking damages of \$6,093.60, being a refund of the amount he paid to M Ltd for the Auction 1 to 6 Items which he says are fake and worthless, and he will return the Auction 1 to 7 Items to M Ltd.
5. I held two teleconference hearings regarding the claim and counterclaim. XT attended the hearings on behalf of M Ltd and was appointed as its representative. KC also attended both hearings.

Onus of Proof

6. An applicant bringing a claim or counterclaim in the Tribunal has the onus of proving his or her claim/counterclaim on the civil standard of proof which is the balance of probabilities (that is, that it is more likely than not). I would like to reassure the parties that I have considered all the information and evidence presented by them when making my determination on the issues, but this order only refers to essential evidence and information material to the issues and is not intended to be a full record of the hearings or of the information and evidence presented.

Issues

7. The issues I need to determine in relation to the claim and counterclaim are:
 - (a) Are the Auction Items 1 to 6, and/or the coins that form part of Auction Items 7, fake and worthless?
 - (b) Has M Ltd breached any obligations it owes KC under the law of contract regarding the Auction 1 to 6 Items and/or the Auction 7 Items?
 - (c) Did M Ltd engage in conduct that was misleading or deceptive or likely to mislead or deceive, or make a false or misleading representation, about the Auction 1 to 6 Items and/or the Auction 7 Items?
 - (d) Under the claim, is KC legally required to complete the purchase of the Auction 7 Items? If so, is M Ltd entitled to a remedy on its claim and is the amount claimed proved and reasonable?
 - (e) Under the counterclaim, can KC return the Auction 1 to 6 Items for a refund? If so, is KC entitled to a remedy on his counterclaim and is the amount claimed proved and reasonable?

Are the Auction Items 1 to 6, and/or the coins that form part of Auction Items 7, fake and worthless?

8. Before determining whether KC is required to complete the purchase of the Auction 7 Items and/or receive a refund regarding the Auction 1 to 6 Items, it is necessary to determine whether the various coins and ingots he purchased from M Ltd are fake and worthless.
9. KC says that after he won the Auction 7 Items, he was told by a friend that the Auction 1 to 6 Items (which comprise only coins and ingots) may be forgeries because some of them were quite rare examples. KC emailed M Ltd on 24 August 2022 to advise that the coins may be 'Chinese knock offs' and that he would be getting items from the last auction tested to check their authenticity and would be in touch. KC then engaged NB of [Testing Company] to test all the Auction 1 to 6 Items for silver content using a [Analyser Machine] and the tests showed that all the items were fake and did not contain silver, rather, they contained a mix of other metals (predominately copper, zinc and nickel), and the silver bullion coins and ingots were coated with a silver plate. KC then decided that he did not wish to complete the purchase of the Auction 7 Items because the coins that form part of the Auction 7 Items are very similar to the Auction 1 to 6 Items and are therefore also likely to be fake and worthless. He says that he does not wish to complete the purchase of the Auction 7 Items because he has lost confidence in M Ltd and doubts the authenticity of the items. The Auction 7 Items remain in M Ltd's safe.
10. I find that Auction Items 1 to 6 are fake based on the findings of NB of [Testing Company] who gave oral evidence at the second hearing about the testing he carried out of the Auction 1 to 6

Items. I am satisfied that NB is a reputable and experienced silver valuer. I have also taken into account that XT on behalf of M Ltd does not dispute NB's findings that the Auction 1 to 6 Items are fake.

11. However, I find that KC is unable to prove that the coins that form part of the Auction 7 Items are fake. This is because he has not had any of those coins tested as they remain in M Ltd's safe. While I have taken into account that KC believes that the coins that are part of the Auction 7 Items must be fake because they are very similar to the Auction 1 to 6 Items, I am not satisfied on the balance of probabilities that such an inference can be made because it is unclear whether the coins in the Auction 7 Items came from the same vendor as the Auction 1 to 6 Items. While it is may well be that the coins in the Auction 7 Items are fake, this has not been proved to the required standard.

Has M Ltd breached any obligations it owes KC under the law of contract regarding the Auction 1 to 6 Items and/or the Auction 7 Items?

12. The law of contract applies to this claim. A contract is formed when one party accepts another party's offer and certain conditions are met. Once a contract is formed, the parties are bound by the terms they have agreed to, and those terms are enforceable by one party against the other. This means that if one party breaches a term of the contract, the other party may seek a remedy.
13. When a person purchases goods at auction through an auctioneer (regardless of whether the auction is onsite or online), they enter into a contract with the auction house as agent for the vendor of the items sold, and the auctioneer and the purchaser are bound by any terms agreed between them. A commercial auction house will usually have standard terms and conditions which a potential purchaser must agree to before registering to bid and/or bidding at an auction run by the auction house. It goes without saying that the auction house is selling the goods auctioned on behalf of the owner of the goods, but the purchaser deals directly with the auction house and will generally not be aware of owner's identity.
14. The general rule is that, as between an auctioneer (often an auction house as is the case here) and the purchaser at auction, the rule of *Caveat Emptor* ('let the buyer beware') applies to goods purchased at auction, and the goods are generally sold on an 'as is where is basis' in accordance with the auctioneer's standard terms and conditions. This means that the purchaser who purchases goods at auction takes a risk that the goods are in good condition and genuine, and cannot bring a successful claim against the auctioneer if they are dissatisfied with the goods. However, if the auction house breaches obligations it personally owes to the purchaser under the contract between them or otherwise, it will be personally liable to the purchaser for their reasonably foreseeable losses.
15. KC says that M Ltd misrepresented the Auction 1 to 6 Items, and the Auction 7 Items, by virtue of the descriptions and photographs in the catalogue and also from the marking on the ingots and the silver bullion coins, and because the USA one dollar coins are in fact not USA one dollar coins and the dated coins are not of the age described. KC says that M Ltd could have cancelled the agreement with the vendor in respect of the Auction 7 Items because he contacted M Ltd by email on 24 August 2022 (3 days after the auction) querying the authenticity of the items. He says that this should have alerted M Ltd to the possibility that the vendor may have breached the warranty provided in M Ltd's terms and conditions that the property is believed to be of the quality and description as stated (cl 7.1(2)). He says that M Ltd has an obligation to pay a vendor 20 working days after an auction (cl 8.1), so the vendor should not have been paid by 24 August 2022 and the purchase could have been cancelled at that time.
16. XT of M Ltd says that all auctions are 'buyer beware' and the goods are sold 'as is where is', so the risk of quality and authenticity is on the purchaser. XT says that auctions must be operated like this as auctioneers do not have the resources or skills to authenticate the items they sell. He says that M Ltd holds regular auctions of goods and it could not possibly check and authenticate every item that it auctions and does not have the knowledge or experience to do so, and it is up to buyers to check the items and make sure they are satisfied with them before bidding. XT does not dispute NB's findings that the Auction Items 1 to 6 are fake, but he says that the Auction 1 to

6 Items and the Auction 7 Items were sold to KC on an 'as is where is' basis in accordance with M Ltd's terms and conditions ("the Terms"), and M Ltd did not provide any warranties either express or implied in relation to such items and M Ltd is therefore not responsible for KC's losses. XT says that M Ltd did not warrant any of the items purchased by KC or make any representations about quality or authenticity.

17. I am satisfied that, before KC purchased the Auction 1 to 6 Items and the Auction 7 Items at M Ltd's online auctions, he agreed to comply with the Terms. This is because I accept XT's description of M Ltd's standard online procedures where a potential purchaser cannot register with M Ltd (a one-off registration) or place a bid at a specific auction (repeated at each auction), until he or she has agreed to comply with the Terms by ticking the relevant box on M Ltd's website, and the Terms are displayed on the website. In any event, KC does not dispute that he would have agreed to the Terms online in accordance with M Ltd's usual procedures. I am satisfied that when KC purchased the Auction 1 to 6 Items and the Auction 7 Items, the Terms applied to the contract of sale and purchase which was formed between M Ltd (as agent for the vendor) and KC at the fall of the hammer. This means that KC is bound by the Terms.
18. Having heard from the parties and carefully considering the Terms and the available evidence and information, I find that M Ltd has not breached any obligations it owes KC under the law of contract regarding the Auction 1 to 6 Items or the Auction 7 Items. I make this finding for the following reasons:
 - (a) Clause 3 of the Terms states that unless stated otherwise in relation to identified property, the only warranties provided by M Ltd are that the title in the property will pass to the purchaser once full payment is made, and there are no encumbrances on the property that were not advised in the particulars of sale or by the Auctioneer before the auction. There is no evidence that there was any warranty provided by M Ltd in relation to the Auction 1 to 6 Items or the Auction 7 Items, so I am satisfied that no warranty was provided by M Ltd in relation to any of the items purchased by KC.
 - (b) KC is unable, under the law of contract, to successfully claim that the various items he purchased were misdescribed by M Ltd. This is because cl 5.1 of the Terms states that M Ltd will not be responsible to a purchaser for any statement or warranty made unless a personal warranty is provided by M Ltd (cl 5.1(1)) or "Any misdescription or errors in condition, state, size, quality or quantity or for any other error whatsoever" (cl 5.1(3)).
 - (c) I have noted KC's view that M Ltd could have cancelled the agreement with the vendor in respect of the Auction 7 Items given that KC contacted M Ltd on 24 August 2022 (3 days after the auction) querying the authenticity of the items, which he says should have alerted M Ltd to the possibility that the vendor may have breached the warranty provided in M Ltd's terms and conditions that the property is believed to be of the quality and description as stated (cl 7.1(2)). He says that M Ltd has an obligation to pay a vendor 20 working days after an auction (cl 8.1), so the vendor should not have been paid by 24 August 2022 and the purchase could have been cancelled at that time. However, while it may have been open to M Ltd to cancel the sale of the Auction 7 Items, I am satisfied that it had no contractual obligation to do so because cl 7.1 sets out a vendor warranty to M Ltd and the purchaser, and it does not give the purchaser a right to make a claim against M Ltd for any breach of that warranty by the vendor, and doing so would not be in accordance with the usual policies and procedures of an auction house and the general rule of *Caveat Emptor* that applies. Based on evidence provided by XT, I am satisfied that the vendor of the coins in the Auction 7 Items was paid by M Ltd on 26 September 2022 in accordance with the Terms, and it is unknown whether the vendor knew that the items were forgeries so that they breached the vendor warranty set out in cl 7.1(2).
 - (d) I am satisfied that cl 4.5 of the Terms does not apply. Clause 4.5 of the Terms specifically states that it will only apply to allow a purchaser to provide evidence of items being a forgery and cancel the sale if the provenance of the property is warranted. I am satisfied that no warranty as to provenance was provided by M Ltd for the Auction 1 to 6 Items or the Auction 7 Items, so cl 4.5 cannot apply.

- (e) I am satisfied that, under the Terms, M Ltd did not warrant or guarantee the quality and authenticity of the items purchased by KC, that the purchase was on an 'as is where is' basis, and the rule of *Caveat Emptor* applied.
- (f) For completeness, I note that M Ltd does not owe any obligations to KC under the Consumer Guarantees Act 1993 ("the CGA") and the implied guarantees of acceptable quality and fitness for purpose that apply to contracts between suppliers in trade and consumers regarding the supply of goods, do not apply to auctioneers. This is because auctioneers are specifically excluded from the definition of "supplier" under s2(1)(b)(iv) of the CGA (although other agents who act, in trade, for another person, do fall within that definition and are subject to the CGA, regardless of whether that other person is in trade). Therefore, while a seller in trade who sells goods through an auctioneer will be subject to the CGA as a "supplier", auctioneers are not.

Did M Ltd engage in conduct that was misleading or deceptive or likely to mislead or deceive, or make a false or misleading representation, about the Auction 1 to 6 Items and/or the Auction 7 Items?

19. I am satisfied that the Fair Trading Act 1986 ("the FTA") applies to M Ltd in this situation. Under the FTA, no person shall, in trade, engage in conduct in trade that is misleading or deceptive or is likely to mislead or deceive (s9 of the FTA). Under the FTA, the term "trade" is defined broadly to mean "any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land." (s2 of the FTA). If the Tribunal finds that a person has breached s9 of the FTA, it may make various orders including an order directing that person to refund money or return property to any person that the Tribunal finds has suffered, or is likely to suffer, loss or damage by that conduct (s43(3)(e) of the FTA).
20. KC says that M Ltd has engaged in misleading conduct under the FTA and says that the Terms are immaterial to the application of the FTA. He says that the descriptions of the items he purchased in the seven auction catalogues, when viewed with the photographs provided of each item in the catalogues, were misleading because he believed the items to be silver when they were not and, instead, they are forgeries. He says that the various fake items are sophisticated forgeries and that the coins are in protective cases which make them appear genuine.
21. However, XT says that the FTA does not place a duty on an auctioneer/auction house to authenticate the goods it auctions, and that M Ltd has not misled or deceived KC the auction catalogue only described what each item stated on its face and it made no statements about the items' quality or authenticity or provided any warranties.
22. I have viewed the descriptions set out in the invoices provided to KC regarding the items he purchased at the seven auctions. The parties agree that the descriptions of the items in the invoices match the descriptions set out in the relevant auction catalogues. I have also viewed examples of the photographs of that appeared in the catalogues beside the descriptions of certain items purchased by KC. The descriptions of the Auction 1 to 6 Items, and the Auction 7 Items, can be summarised as follows:
- 4 lots (coins only) purchased in Auction 1 on 17 April 2022. Two lots were described as "USA One Dollar Coins..." and "Australian 1937 Crown". The other two lots were described as "USA Silver Coins x 4".
 - 8 lots (coins and ingots) purchased in Auction 2 on 26 June 2022. The coins* were all described as "USA One Dollar Coins" or "USA Coins" (with dates), and the ingots were all described as "Ingots".
 - 9 lots purchased in Auction 3 (coins and ingots) on 3 July 2022. The coins were all described as "USA Coins" (with dates), and the ingots were all described as "Ingots".
 - 2 lots (coins only) in Auction 4 on 17 July 2022. One lot was described as "USA Coins" (with dates) and the other lot was described as "1925 USA Half Dollar".

- 12 lots (coins only) in Auction 5 on 31 July 2022. All but one lot was described as “USA Coins” (with dates), and the other lot was described as “Collection of Old Coins” (with dates).
- 34 lots (coins only) purchased in Auction 6 on 14 August 2022. The lots were mostly described as “USA Coins” (with dates), along with some specific descriptions eg “1822 Coin”, “1933 Crown”, “Victoria 1887 Coin”, and “1900 Trade Dollar”.
- 17 lots (coins and one cameo brooch) in Auction 7 on 21 August 2022. All but two of the coin lots were described as “USA Coins” (with dates), and the other two coins were described as “1925 Half Dollar ‘California Diamond’” and “1935 Australian Florin Centenary Victoria”.

23. I am satisfied that the rule of *Caveat Emptor* and any restrictions set out in the Terms do not apply if M Ltd has breached the Fair Trading Act 1986 (“the FTA”) during its dealings with KC. However, after careful consideration, I find that M Ltd has not engaged in conduct that causes a breach of the FTA with regard to Auction Items 1 to 6 and Auction Items 7. I make this finding for the reasons set out below.

24. I am satisfied that the descriptions are based on the information stated on the face of the relevant item (coins or ingots) and do not go further than that. Most of the coins, and all the ingots, are not described as being ‘silver’. While I note that ‘silver’ is mentioned in the description of 3 lots of coins, I am satisfied that it more likely than not that the word ‘silver’ appeared on the coin itself being described. For instance, a photograph of a USA one dollar coin shows that the face of the coin states: “1oz Silver”.

25. I am satisfied that M Ltd has not breached the FTA by providing a photograph of something calling itself ‘silver’. This is because using the word ‘silver’ in this context is descriptive of the face of the item being described rather than a representation that it is made of silver or regarding its quality or authenticity. In this regard, I have taken into account KC’s view that a description of an item as ‘silver’, taken in context, conveys to a reasonable person that the item contains silver, rather than being a description of their appearance or what is stated on the item’s face. However, I respectfully disagree with this view.

26. I note that the description of some coins specify a particular year. KC says that this indicates that the coins are genuine coins of that era. However, I am satisfied that stating the year specified on the coin is descriptive of the face of the coin rather than being a representation that the coin is of that particular year or age.

27. I also note that the photographs of the ingots show that the face of the ingots state “.999 Fine Silver 1 ounce”, and the description in the catalogues of the ingots is “ingot”. I am satisfied that the fact that a photograph of the face of the ingots was included in the catalogue does not cause a misrepresentation or breach of the FTA by M Ltd.

28. I have taken into account that, with regard to the Auction 7 Items, it is unknown whether they are forgeries or not, but this does not affect my findings. For completeness, I note that I raised misrepresentation under s35(1)(a) of the Contract and Commercial Law Act 2017 (“the CCLA”) with the parties at the hearings. However, I have made my findings under the FTA and it is unnecessary for me to also consider s35(1)(a) of the CCLA because it would not change my findings or the outcome.

Under the claim, is KC legally required to complete the purchase of the Auction 7 Items? If so, is M Ltd entitled to a remedy on its claim and is the amount claimed proved and reasonable?

29. M Ltd brings a claim against KC in the Tribunal seeking damages of \$1,638.00, being the amount required to complete the purchase of the Auction 7 Items. For the above reasons, I am satisfied that KC is required under the law of contract to complete the purchase of the Auction 7 Items by paying M Ltd the purchase price of \$1,638.00 (including buyer’s premium and GST) and taking delivery of the items purchased in accordance with the Terms.

30. I therefore award damages of \$1,638.00 to M Ltd which KC is to pay by the date set out in the order. In addition, KC is to pay delivery costs to M Ltd by the date set out in the order, and M Ltd

is to deliver the Auction 7 Items to KC within ten days of such payment. If KC does not pay the amounts set out in the order by the specified time, the Auction 7 Items will become the property of M Ltd and it may dispose of them as it sees fit.

Under the counterclaim, can KC return the Auction 1 to 6 Items for a refund? If so, is KC entitled to a remedy on his counterclaim and is the amount claimed proved and reasonable?

31. KC brings a counterclaim against M Ltd seeking damages of \$6,093.60, being a refund of the total amount he paid to M Ltd for the Auction 1 to 6 Items which he says are fake and worthless. For the reasons set out above, I dismiss KC's counterclaim.

Concluding Note

32. I acknowledge that KC will be disappointed with this outcome. I also note that KC is very upset that M Ltd has continued to list and sell coins and ingots similar to the Auction 1 to 6 Items which he believes may be from the same vendor and are likely to be fake. However, the Tribunal has no jurisdiction to prevent M Ltd continuing to sell such items.

Referee: D Brennan DTR

Date: 2 February 2023



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.